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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, *Petitioner,*

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

The question here is whether, after voluntary payment in full of overtime claimed and the taking of a release of any further liability, the employer may nevertheless be subject to suit for statutory liquidated damages under Section 16(b) of the Fair Labor Standards Act of 1938. The trial court held for petitioner, but the appellate courts below deemed the statute such as to invalidate all releases. At the trial there were issues both (1) as to coverage of the building and (2) as to the validity of releases given upon full voluntary payment of overtime compensation.

The issues below, and hence the issue here, is whether the Fair Labor Standards Act itself precludes settlements. Three positions have been taken in the briefs. Petitioner has taken the position that the statute does not prohibit the settlement. Respondent takes the position that, assuming there may be no settlement of the base wage or overtime, there can be no settlement of liquidated damages because the two are "indivisible." The Solicitor General, filing a brief *amicus* at the suggestion of the Court, agrees with petitioner that there may be a settlement but takes the position that the particular settlement here involved is invalid because of the circumstances.

In arguing these several positions, considerable confusion is created by failure to distinguish between bona fide settlements and mere contracts waiving statutory rights, between settlements of wages and releases of damages, between law and administration, and between the issue in this case and the possibilities in various other hypothetical situations.

I

The Solicitor General agrees with petitioner that the question here is one of statutory construction and that settlements waiving liquidated damages may be made under the statute.

The Solicitor General states, and petitioner agrees, that "whether or not a statutory right may be released by an individual beneficiary depends upon the intention of Congress as manifested in the particular statute" (Br. 10); and the Solicitor General assumes that "a release of the statutory right to liquidated damages under the Fair Labor Standards Act might be valid" under proper circumstances (Br. 23). The statute here contains no prohibition against settlements, and indeed such a provision was eliminated from the bill (Pet. Br. 10-11 note 6). It is

petitioner's position that, in the absence of such a prohibition and where settlements do not defeat the operation of the statute, they are manifestly lawful because recognized and favored in all fields of the law (Br. 13-16). In the few instances where Congress has desired to modify this practice, it has done so expressly (Pet. Br. 14). Particularly in federal labor legislation, adjustment and agreement are a basic feature of both law and administration.[1] The Fair Labor Standards Act itself recites that its purpose is to "correct and as rapidly as practicable to eliminate" all "labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (Sec. 2(a) and (b)). Petitioner, as set forth in its brief on the merits (pp. 10 *et seq.*), is confident that no statutory impediment to settlements may be implied from the statute here involved.

II

The Solicitor General erroneously (a) assumes that in this case there was a release of statutory wages and (b) fails to distinguish between settlements and mere waivers.

(a) Here any liability to pay statutory wages or overtime has admittedly been voluntarily paid in full prior to

[1] The Labor Department mediates labor disputes (37 Stat. 738). The Norris-LaGuardia Act prohibits injunctions being granted any party "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration" (47 Stat. 72). The Labor Relations Act in its declaration of policy commends "friendly adjustments of industrial disputes arising out of differences." (49 Stat. 449). The Railway Labor Act provides for adjustment and mediation boards (44 Stat. 578 and 579; 48 Stat. 1189 and 1193). The third paragraph of Executive Order No. 9017 establishing the National War Labor Board grounds procedure upon conciliation and agreement (7 F. R. 237). This Court has recently emphasized that the National Labor Relations Board "has from the very beginning encouraged compromises and settlements." *The Wallace Corporation* v. *National Labor Relations Board* and *Richwood Clothespin and Dish Washers Union* v. *National Labor Relations Board*, Nos. 66 and 67, October Term, 1944, December 18, 1944.

demand or suit (Pet. Br. 4). The Solicitor General, however, states the question as though there were presented in this case a question as to the release of liability for *both* "unpaid wages and liquidated damages" (Br. 3). But the question here is, as stated in petitioner's brief (p. 2, emphasis supplied):

> Whether an employee has a right to statutory *liquidated damages* for non-payment of overtime . . . where, prior to either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability.

The Solicitor General's error may result from his attempt to frame a single question to embrace both this case and No. 554.

(b) Secondly, the Solicitor General states as a major premise of his entire argument that (Br. 10):

> Any contract, whether by way of release or otherwise, whereby an employee is to receive less than the amounts prescribed in [Sections 6 and 7] is illegal.

If this statement is meant to include both settlements and mere waivers, it is erroneous. Of course, no employer may enter into a contract with an employee requiring the latter to waive minimum wages or overtime—because that would plainly be a use of contract to avoid the statute entirely. But that does not and cannot mean that—where there is a dispute of fact or of law—the parties may not in a particular case settle or compromise a claim for statutory wages or overtime; for otherwise parties would be put to the expense of litigation for the determination of every dispute.

Even where the dispute involves statutory minimum wages or overtime, there must be adjustments. The Solici-

tor General does not deny that the Administrator makes such adjustments; and in the nature of things the Administrator must necessarily settle, or arrange settlements, of cases in which the number of hours, the coverage, employment, or other factors are in dispute. It is unreal to say that there may be no settlement for less than 100% of the statutory wages or overtime, for in some cases these cannot be determined. It is therefore a purely theoretical assumption for the Solicitor General to say, as he does at page 19 of his brief, that in Government settlements "the wages due are of course always paid"—because that statement can be true only if it is assumed both that "wages due" can in all cases be determined with nicety, precision, and absolute perfection of truth, law, and fact in every case and that liability is always clear or to be assumed.

III

Both respondent and the Solicitor General draw erroneous conclusions from this Court's limitation of review to the factual situation presented.

This Court granted the petition "limited to the second question presented by the petition for the writ" (R. 83). That question was (Pet. 2):

> 2. Whether upon such payment a release of any such additional liability does not bar recovery of such damages.

The word "such", which is used twice in the question, referred to the first question, which reads:

> 1. Whether employees have any right to sue for statutory liquidated damages for non-payment of overtime * * * where the employer prior thereto has voluntarily paid the full amount of such overtime.

The question upon which certiorari is granted, therefore, is correctly stated at page 2 of petitioner's brief on the merits

and quoted in point II, *supra*. (Petitioner has assumed that this Court in limiting the review to the second question meant to confine the parties to a payment case in which a release had been taken—that is, to confine the parties to the factual situation presented.)

In this situation, respondent concludes that petitioner has improperly amalgamated questions one and two of the petition (Resp. Br. 5) and that no question of an agreed settlement or "accord" is involved but "merely the question of legal sufficiency of a release" (pp. 5-6, 26). Clearly, however, the second question of the petition expressly refers to a situation in which there has been full voluntary payment of overtime claimed, before the institution of a suit for liquidated damages. Clearly, this Court did not grant certiorari to review merely the documentary sufficiency of the release as a matter of form, but granted the writ to determine whether the statute interposed any bar to settlements in cases in which the employer paid an overtime claim and the employee gave an unequivocal renunciation of any further liability.

The Solicitor General takes a much different position. He assumes that "mere payment of the unpaid wages does not abrogate the liability for liquidated damages" (Br. 11, 13, and note 15). But it is perfectly plain that this broad generality confuses at least four different factors or kinds of situations: (1) the time of payment, (2) the presence of an accord of the parties, (3) unilateral restitution by the employer, and (4) administrative enforcement. In each of these, different questions are presented:

(1) There may be cases where payment of wages is reasonably delayed, either because of doubts of coverage or hours, mistake, or for other reasons. The Solicitor General admits that "the Act does not specify a time for payment" and that payment alone might be sufficient to preclude

liability for damages "if not unreasonably delayed" (Br. 13 and note 14). Here there was mutual acquiescence in the delay, there was a voluntary payment by the employer upon the possibility of coverage, and there was and remained a dispute as to the factual basis for coverage. All of these facts are fully developed under the final heading of this brief (see point V *infra*). It is petitioner's position that, under these circumstances, there was here no unreasonable delay.

(2) The second situation in which payment of statutory wages or overtime may be made is one in which the parties in some manner manifest an intention to preclude all further liability. This may obviously be done by various methods—including a stipulated judgment such as this Court itself entered in Nos. 345 and 346 at the present term. An express release is manifestly a clear and unequivocal method of stating the intention of the parties, as presented by the facts of this case. In short, the function of a release is to show intent, although we may quite safely assume that it is not the sole means of doing so.

(3) The third situation is one in which the employer has made full restitution, but there is nothing except the employee's acceptance to show intent of the parties to thus conclude all disputes and all liability. The Solicitor General assumes to cover the situation even though here the employee, in addition, gave an express release on receiving payment. Should the Court consider the situation of simple payment and acceptance, the following factors which are overlooked in the Solicitor General's brief may well be considered: The statute provides liability for damages upon suit for "unpaid" wages or overtime and makes no mention of suit for liquidated damages alone—thus predicating liability for damages upon the necessity

of an employee's suit for failure of payment of the statutory wages or overtime. That Congress so understood it appears unequivocally from the legislative history, despite the Solicitor General's insistence that it is not "of any assistance" here (Br. 14). A member of the Conference Committee stated on the floor (83 Cong. Rec. 9264, emphasis supplied):

> If there shall occur violations of either the wages or hours, the employees can themselves * * * maintain an action in any court to recover the wages due them and *in such a case* the court shall allow liquidated damages * * *

And the Conference Report itself states that the employee may recover (83 Cong. Rec. 9255)

> twice the amount by which the compensation he should have received exceeds that which he actually received.

The Administrator has so construed the statute in his annual reports:

> Section 16(b) confers upon employees an independent right to sue for legally earned but unpaid minimum wages or overtime compensation and, *if successful*, to recover an equal amount in liquidated damages, as well as court costs and a reasonable attorney's fee. (Annual Report, 1941, p. 98, emphasis supplied; and see 1940, p. 146.)

The Solicitor General concedes that the Administrator engages in office settlements excluding liquidated damages, without any formal release of further liability, in which the parties "probably anticipate that the settlement upon which they agree will in practical effect be final" (Br., p. 18).

(4) In still another situation full payment alone without more at least raises a serious question. Section

17 authorizes the Administrator to secure injunctions to force compliance. In these cases he is authorized only to secure compliance with Sections 6 and 7 relating to unpaid wages or overtime. In these cases he secures judgments, including restitution of unpaid wages or overtime, either after contest or upon consent. The employees are thus, by the Administrator's action, made whole but are not paid liquidated damages. It is not a unilateral restitution, and the employee has been put to no expense for litigation. Do employees thereafter have a right to bring actions for liquidated damages although their unpaid wages or overtime have been paid? If so, Congress has provided two actions in place of one and has placed upon employees the burden of further litigation where the issues have once been reduced to judgment. If that is the situation, then the member of the Conference Committee erroneously informed Congress, when the bill was under consideration, that it was "both a common sense and economical method of regulation" (83 Cong. Rec. 9264).

There are, in addition, office cases in which the Administrator procures or participates in securing payment of wages or overtime without suit. These are not unilateral. In these cases the Administrator may actively participate in the settlement, as in the instant case (see note 3 *infra*). The employee has been put to no expense of litigation, nor is he required to employ counsel. This situation is fully set forth under the last heading of this brief (see point V(a) *infra*).

IV

Respondent's contention that the liquidated damages are "indivisible" ignores the statute, legislative intent, admin-

istrative interpretation, and practicalities of employer-employee relationships.

Respondent's argument is that, assuming statutory wages and overtime are not subject to waiver or release (see point II *supra* and see Resp. Br. 8-18), liquidated damages are not subject to settlements because wages or overtime and liquidated damages are one "entire and indivisible liability" which is a "single right" (Resp. Br. 20-21). Pursuing this theory, respondent takes sharp issue with petitioner's reference to "base liability" in the form of unpaid wages or overtime (Resp. Br. 22). But the Solicitor General distinguishes between the "base requirements" (Br. 11 note) or the "base liability" (Br. 17) and admits that "the primary purpose of the statute is to insure compliance with Section 6 and 7" relating to minimum wages and overtime compensation but not to liquidated damages (Br. 16-17). From these two different points of view, the Solicitor General and the respondent reach the following different results:

The Solicitor General, having had no difficulty in asserting that the "base liability" could not be waived (see point II *supra*), finds settlement waiving liquidated damages to be a "much more troublesome and difficult question" (Br. 11) because the statute "is not very explicit on the point" (Br. 12) and hence "not very helpful" (Br. 14). The Solicitor General then finds that a settlement, under proper circumstances, may include a waiver of the statutory liquidated damages (Br. 23-24).[2] If there is no statutory

[2] Resorting to "the general policy embodied in the Act" (Br. 14), the only consideration the Solicitor General finds against the validity of settlements waiving liquidated damages is that the latter are designed as compensation for delay. In suggesting this argument he assumes that the separate provision for attorney's fees and costs takes care of all expenses of litigation—which is contrary to fact as every litigant knows—and also assumes that the employee's wages are entirely withheld so that he has been "unable to pay bills, or insurance premiums, or payments on his

impediment to a settlement, on general principles of law and legislative practice (Pet. Br. 13-16) there can be no ground of objection. If Congress desired to penalize delay by an irrevocable liability, it was for it to do so as it has in one statutory instance (Pet. Br. 11). If Congress deemed the facts such as to make it necessary to protect employees against the possibility of improvident settlements, it was for it to do so by appropriate provision as it has done in certain other statutory instances (Pet. Br. 14) and it is not for courts and lawyers to assume facts and remake the laws. So far as the liquidated damages are a "deterrent" of violations, to place them beyond the pale of settlement will only intensify and prolong litigation rather than promote payment of the basic liability (Pet. Br. 17-19).

The respondent—upon the theory of "indivisible" duty to pay both statutory wages or overtime and, in cases of any delay, liquidated damages as well—seeks to make liquidated damages something as special as wages and not settleable under any circumstances. Here respondent relies on *Overnight Motor Transport Co.* v. *Missel*, 316 U.S. 572, 581-

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home when due" (Br. 15). Thus, argues the Solicitor General, "insurance or property may be lost, or credit impaired, or he may be unable to incur medical expense for himself or his family when needed" (Br. 15). But these arguments are unreal in this case because the employee regularly received his full wages pursuant to collective bargaining agreements (R. 7-8), never reckoned himself as entitled to the additional overtime later voluntarily paid him (R. 15, 17), had left the employment two and a half years previously, and hence received a windfall rather than his demand after struggle and privation. The Solicitor General imports another factor into this argument by asserting that the "economic inequality between employers and employees * * * aggravates these consequences" (Br. 15) because it allegedly causes employees to accept any settlement proffered them in order to meet "pressing needs" (Br. 16). But in making this latter portion of the argument, the Solicitor General departs from the compensatory view of the liquidated damages and frankly considers them as serving "to effectuate the policy of the statute by discouraging violations" (Br. 16) and thus supplying a "deterrent effect which Congress plainly intended that Section 16(b) should have" (Br. 16). To these arguments the answers are plain, as set forth in the text.

582 (Resp. Br. 2-3, 7-8), which held that, after judgment in litigation to recover unpaid minimum wages or overtime, the court has no authority to mitigate or remit the liquidated damages provided. But that was laid down in a case where there was no payment of the basic liability, no release of any additional liability, and the employee was compelled to litigate his right to the base liability.

There are other conclusive answers to respondent's position. *First*, Section 16(b) does not purport to make damages inseparable but, instead, provides for them only if an employee is compelled to bring an "action to recover such liability" for liquidated damages (Section 16(b)). Section 6 says that an employer "shall pay" the prescribed minimum wages and Section 7 says that no employee may labor more than the prescribed minimum hours "unless such employee receives compensation" therefor "at a rate not less than one and one-half times the regular rate.". But the employer is not so directed to pay liquidated damages; Section 16(b) merely makes him "liable" for them in the statutory employee's action. Section 16(b) makes no provision for suit for damages without unpaid wages or overtime, because the damages are to be no more than an amount "equal" to the unpaid wages or overtime sued for. *Secondly*, the statute as a whole specifically treats liquidated damages as something separate and secondary. The Administrator's statutory injunctions under Section 17 do not include anything more than the unpaid wages or overtime. Criminal penalties do not apply to non-payment of liquidated damages. *Thirdly*, the administrative practice in settling cases does not require the payment of liquidated damages (Pet. Br. 18 note; Gov't Br. 17-20). *Fourthly*, the administration of the law will be made more difficult if cases may not be settled for less than 200% of the base liability (Pet. Br. 17-20).

V

The Solicitor General, conceding the propriety of releases of liquidated damages but contending that the release here is unlawful because of the circumstances under which it was given, injects issues into the case which were not presented below and are based on assumptions contrary to fact.

The Solicitor General, while conceding that there may be settlements waiving liquidated damages (Br. 23-24), contends that the release here is unlawful because (a) obtained through "overreaching" and (b) not founded upon the consideration of a bona fide dispute between the parties. But—in their bearing on the lawfulness of the release—these are new issues, not presented, determined, or the expressed ground of any of the decisions below. They are therefore not proper issues here. Petitioner has had no opportunity to present the facts for the record. Assuming, however, that these are proper issues at this time, the record—aided by judicial notice of public records (*Jones* v. *United States*, 137 U.S. 202, 216; *Underhill* v. *Hernandez*, 168, U.S. 250, 253; *Fletcher* v. *Jones*, 105 F. 2d 58, 61-62, cert. denied 308 U.S. 555; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 312)—completely refutes the factual basis of the issues so raised by the Solicitor General.

(a) *The alleged "overreaching" by petitioner in securing the release is contrary to fact.*—Respondent's brief merely asserts, without attempting to rely upon the fact in argument, that respondent was not advised of his rights to liquidated damages (Br. 3) and, as heretofore stated, respondent expressly disclaims any issue as to an accord and satisfaction (Br. 5-6, 26) and simply argues that liquidated damages cannot be released at any time, under any circumstances, for any purpose. The Solicitor General attempts to establish it as a fact that the unionized employee was not informed of his rights (Br. 5 note 3 second ¶, and 20-21).

That is a fact which, if in issue at all, was for the trial judge who heard the witnesses to determine; and on familiar principle he must be conclusively presumed to have found the facts to be those supporting his judgment dismissing respondent's complaint (R. 51). If it was an issue, "in the absence of findings of fact to the contrary, it is to be presumed that all things necessary to make * * * the release valid were done regularly" (*Klamath Indians* v. *United States*, 296 U.S. 244, 253). Moreover, the record amply supports such an implied finding. The representative of petitioner who paid respondent and secured the release from him testified that he "explained the nature of the paper that would have to be signed" (R. 42) and "showed him the release and told him its contents" (R. 47). The trial court itself elicited the witness' testimony that he explained the release as one completely disposing of "all claims that he might have" (R. 50)—although respondent later denied that he had been told that the release was a complete one (R. 51). But respondent could read the English language (R. 17), the release was shown to him (R. 47), and he did not testify that he was "not aware of his right to an amount in excess of the unpaid wages" as the Solicitor General erroneously assumes (Br. 20). Upon this state of the record, in view of the issues presented, and since "the burden was on plaintiffs to prove the absence of a valid release" (*Klamath Indians* v. *United States*, *supra*, p. 252), the trial judge was certainly justified in drawing his own conclusion as to the fact of full discussion and explanation of the release. The only appellate judge who mentions the point says that (R. 66): "The plaintiff accepted the check and signed a general release, after that paper had been explained to him."

Next the Solicitor General erroneously assumes that "petitioner computed the statutory overtime compensation due" (Br. 4, 22). The Solicitor General therefore contends that "a distinction may be drawn * * * between situations

where the employee's interests were safeguarded by * * * a government agency, and situations in which dealings took place directly with the employee himself" (Br. 20)—the former being such a situation as would (in the Solicitor General's view) validate the release and the latter constituting "an overreaching not compatible with the statute" (Br. 20): *But the fact in this case was that the Government agency did actually compute the wages due and took an active, routine, and formalized part in the transaction.* If there was a failure to advise the employee of rights, it was because the participating agency chose neither to advise the employee nor to have petitioner do so.[3]

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[3] Although it does not appear in the record because not an issue at the trial, the fact was that petitioner's representatives conferred with the Administrator's regional office on the method of making payments and secured from the Administrator Form CI-31A entitled "SUMMARY OF UNPAID WAGES UNDER THE FAIR LABOR STANDARDS ACT OF 1938 AND EMPLOYEES' ACKNOWLEDGMENT OF PAYMENT," which are legal-size forms containing columns for signatures of employees, their occupation and address, and the amounts due them. This form was filled in by petitioner, then submitted to the Administrator together with the work sheets for checking. These work sheets were required to be submitted with a covering affidavit on Form CI-31B certifying to their accuracy and stating that:

> If this statement is accepted by the Wage and Hour Division, the undersigned firm agrees to make immediate restitution of the amounts computed in accordance with the requirements of the Fair Labor Standards Act.

Thereafter Form CI-31A, after approval by the Administrator, was returned to petitioner. Upon it the petitioner was required to secure the signature of each employee upon making payment. At the top of these forms appears the following:

> We, employees or former employees of the above establishment, by affixing our signatures hereto, acknowledge the payment of the amounts shown opposite our respective signatures, such amounts being unpaid wages as computed or approved by the Wage and Hour Division under the Fair Labor Standards Act of 1938 and covering the period or periods of employment from October 24, 1938 to

In this case the last blank had "September 12, 1942" filled in. (It should be noted that the Administrator's form carefully refrains from notifying either the employees or the employer that there is any possibility of additional liability in the way of liquidated damages. *Cf.* Gov't Br. 20-21.)

Curiously enough, the Solicitor General takes the position that, because in settlements handled by the Department of Justice "the employees' interests were safeguarded by counsel," they are proper (Br. 20). There the employees are required to do the following things which respondent here did not have to do—make demands, secure counsel, institute suit, and convince several government agencies that they "should prevail" (Br. 19)—so that they are put to burdens which might require damages not sustained in the instant case. Moreover, the Solicitor General admits that the presence of counsel does not alter the practical situation because "almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages" (Br. 19). Indeed, since the Solicitor General makes no mention of payment of attorney's fees, presumably employees' counsel must be paid out of the settlement and hence employees may net less than the full restitution afforded respondent. Thus the settlements negotiated with the Department of Justice may leave the employees with less than respondent received with no suit or other effort in the instant case. Furthermore, nowhere does the Solicitor General say that in these cases the employees are informed of their rights to the mandatory liquidated damages in cases of employee's suits as held by this Court in *Missell* v. *Overnight Transportation Co., supra.*

But this was not all, for by letter dated October 14, 1942, petitioner was formally advised as to the procedure and directed to obtain also individual receipts from the employees in the form set forth in note 12 on page 18 of petitioner's brief on the merits. Respondent executed both of these forms. During the conference with the administrative officers, petitioner also showed them the form of release which appears in the record (R. 7-8) and was told that there was no objection; and respondent, as the record shows, also executed that form. It is notable that no official document even suggests that there is any liability for liquidated damages after such payment, much less requesting the employer to so advise employees or to be so advised.

Finally, respondent manifestly knew that he was called upon to surrender something when presented with the release for signature. It is wholly unfair to demand—as the Solicitor General apparently demands—that the employer represent and concede that the employee "is *entitled* to more than the back pay which the employer is offering him" (R. 16) or that he had a "*right* to an amount in excess of the unpaid wages" (R. 20-21) when there were questions as to coverage, as to liability for either back pay or for liquidated damages, and as to the amount due. There was, and we think there still is, a question of law as to whether voluntary payment alone would not extinguish any right to liquidated damages (see point II, *supra*); and neither the Administrator nor any court at the time had taken any contrary position, nor had this Court ever held the contrary. In the next and final point of this brief the nature of the question of coverage is fully set forth. Moreover, here at the time of payment—although the record does not show it since not an issue at the time of trial—petitioner as a bank had first been nothing more than a mortgagee in possession, later owner (R. 6), and was faced with liability predicated upon uncertain facts existing several years previously and subsequently changed (R. 45). It soon disposed of the property. In these circumstances—particularly in the light of the issues of law and fact next presented in the final point of this reply brief—no one could reasonably demand that the petitioner confess additional liability on making payment where he either did not believe there was any such additional liability or doubted it.[4]

[4] The law as stated by this Court has always been that representations as matters of law are matters of opinion upon which no liability may be predicated. *Upton* v. *Tribilcock*, 91 U. S. 45; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327.

(b) *The assumed lack of a "dispute" or "consideration" ignores the facts and the law.*—Here there were several disputes. One was coverage. Another was the amount of overtime. Another was whether payment alone would not set at rest incipient liability for liquidated damages.

(1) The Solicitor General, citing the greater part of the testimony *en masse*, asserts that "a substantial portion of [the] building [in which respondent had been employed] was devoted to the production of goods for interstate commerce" (Br. 3-4) and thereafter merely assumes that it was "occupied by producers of goods for commerce" beyond "any dispute" (Br. 21-22). Both respondent (Br. 2) and the Solicitor General (Br. 21) assume that any dispute in this case had been laid at rest, prior to the payment and release, by the decision of this Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, which—the Solicitor General says—"clarified the law on coverage of maintenance employees in buildings occupied by producers of goods for commerce." But one dispute here was whether the building at which respondent served *was* "occupied by producers of goods for commerce."

More properly, there was a dispute as to whether, in the words of the *Kirschbaum* case (p. 519), the tenants of the building at the time of the respondent's employment were "principally engaged in the production of goods for interstate commerce." The *Kirschbaum* case did not establish coverage as the Solicitor General assumes (R. 22) but merely the sufficiency of the relation of building service employees to production—as later emphasized by this Court in *Walton* v. *Southern Package Corp.*, 320 U. S. 540. The question here, on the other hand, was whether there was production in the building, whether it was for interstate commerce, and whether it was the principal activity in the building.

The situation is much the same as in *North Shore Corporation* v. *Barnett* and same v. *Scott* where this Court in *Overstreet* v. *North Shore Corporation* had first found the necessary proximate relation of employment to interstate transportation (318 U. S. 125). Thereafter the fact of substantial interstate transportation was unsuccessfully contested (143 F. 2d 172), whereupon this Court granted certiorari (Nos. 345 and 346, October 9, 1944). This Court then permitted the parties to have a consent judgment entered reducing the recovery to two-thirds of the judgment for statutory wages and liquidated damages (see the Journal entries for December 11, 1944). There the mere prior establishment of the employment relation to commerce did not conclude the issues of coverage, as this Court's subsequent grant of the petitions for certiorari in Nos. 345 and 346 demonstrates. The entry of a consent judgment was also a settlement, protected as *res judicata*—unless all settlements are outlawed as respondent contends and the employees are in that case at liberty to have the consent judgment reopened.

The dispute in the instant case relates to the nature of the business done in petitioner's building some years prior to the payment and release. A false cast is placed upon the nature of that question, because respondent long subsequently precipitated a trial of the issue. It is true that respondent prevailed on this issue in the appellate courts below, but he did not prevail in the trial court. The fact that petitioner did not deem the factual question of such general importance as to warrant asking this Court to review it (Pet. 5; Pet. Br. 5) certainly does not negative the bona fides of the original dispute. "Dispute" does not mean that the party relying upon it must be correct, or must ultimately prevail in subsequent litigation on the point. Petitioner might not have litigated the issue at all,

relying instead solely upon the validity of the release. Respondent had the burden—if there was any such issue raised at the time—to show that *neither of the parties at the time of the settlement* had a bona fide question of law or fact as to liability. That the employee was unassertive certainly cannot preclude the employer from settling liability—as the Solicitor General argues (Br. 22).

However, it is apparent from the record not only that there was a real dispute as to coverage but that the decisions of the appellate courts below on coverage are erroneous. The Solicitor General mistakenly insists that "the record in this case admits no doubt that the employee was covered by the Act" (Br. 4 note 1). At the trial successfully, and in the appellate courts below unsuccessfully, petitioner contested coverage. Respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 46) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 18-50). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 18-21, 24, 35, 37-38) and their failure to identify the period for which they spoke (R. 41), none of them testified that the tenants were engaged in substantial *production* for interstate commerce. There was insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged *in* commerce"; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569; but the instant situation falls rather within the third situation, namely, that "evidence of a wholly general character * * * lacks that

particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. The Solicitor General's reference to one tenant's importation of a large part of its goods from outside the state (Br. 4 note 1) is entirely immaterial because respondent was not engaged "in" commerce but was merely a business building watchman. *McLeod* v. *Threlkeld*, 319 U. S. 491. As this Court said in the latter case (p. 497), "employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce". This leaves as the sole relevant question of fact whether in petitioner's building the tenants were principally engaged in "production of goods for [interstate] commerce". In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 18-50)—that he be engaged in an "occupation necessary to the production" (Section 3j) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525). To find such coverage of respondent the Solicitor General asserts that gloves were manufactured on the premises but one witness cited does not identify what portion was shipped interstate but merely that gloves were sold "inside and outside the State of New York" (R. 24) and the other admittedly "never did any actual manufacturing of these goods at the premises" (R. 34). The only other witness cited by the Solicitor General was a truck driver (R. 19) of a tenant company which he admitted "was engaged in the business of buying and selling furniture" (R. 18) and did a "wholesale business" (R. 19). While he testified that a good portion of its sales "went to New Jersey or Connecticut" (R. 19), his testimony established that there was no manufacturing of furniture by the company but that its goods were purchased from

Grand Rapids and other furniture manufacturing centers (R. 18) and the company merely "assembled" or sprayed or "colored" some of it (R. 20). The basement of the building was used to store furniture (R. 22). Moreover, the building leases contained covenants against manufacturing (R. 44-45) which were enforced (R. 43). Subsequent to respondent's employment the ban on manufacturing was lifted and the nature of the tenancies changed (R. 45). Hence, on all the evidence, the trial judge had at least ample ground to find a lack of manufacturing and therefore a lack of coverage as to a service employee such as respondent. Certainly this evidence fails to establish coverage of the building, and hence of service employees, under the terms of the statute here involved. Even if by some indulgence it could, the evidence still demonstrates the bona fides of the dispute and the questionable coverage of the Act in this case.

(2) The respondent assumes that the amount petitioner paid respondent was "concededly earned" (Br. 2-3) and the Solicitor General assumes that the amount so paid was "due" (Br. 4). But these assumptions seek to make capital out of the settlement by taking the payment as a sort of admission against interest, contrary to the usual and familiar rule necessary to protect parties and make settlements possible. The claim here is predicated upon an alleged failure to pay overtime as earned some two years before the institution of the present suit. The respondent had long since left petitioner's employ. The computations were made by petitioner and the Administrator. It does not appear whether the Administrator advised with respondent. As to the computations, the record shows nothing as to negotiations between the Administrator and petitioner in arriving at the final figures. Nothing is shown as to the contentions or concessions made by either. Since the computations related to overtime, there were naturally ques-

tions as to the number of hours worked each week as they fluctuated from week to week, allowances for holidays, days off, and the amounts previously paid and changes made in rates of pay under collective bargaining agreements during the period. All of these related to a period of about two years ending over two years prior to the time the settlement figure was agreed upon. There had previously been no statement or settlement of accounts between the parties, so that the amount in issue had never been liquidated. "Any payment received in full satisfaction of an unliquidated or disputed claim is sufficient consideration." Williston, Contracts, Rev. Ed. 1936, § 128, p. 437.

The Solicitor General, however, apparently unaware of the Administrator's part in the transaction, deems it significant that the employer did not argue with respondent when making the payment and argues that "voluntary payment * * * is quite inconsistent with the existence of an 'active controversy'" (Br. 22; note 3, second ¶). But surely the law cannot require, as the price of a valid settlement, a demonstration of haggling in the fashion of the market place. There was little if any practical room for such argument at the time of the payment because the sums had been arrived at through the administrative process provided by the Administrator and presented to respondent upon official forms officially approved as to their contents (see note 3, *supra*). Moreover, the record shows that there was some discussion at the time of payment (R. 50). As this Court has said, "in this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute" (*Chicago, Milwaukee, &c. Ry. Co.* v. *Clark*, 178 U. S. 353, 367) so that there was ample basis to support a settlement and release of all further liability.

(3) There was also a question of law as to whether, under the circumstances, the petitioner might be subject to lia-

bility beyond restitution of statutory overtime. There was a question whether voluntary payment alone would not extinguish any liability for liquidated damages, attorney's fees, or costs (see point III(3), *supra*)—and neither the Administrator nor any court had taken the position that it did not do so. There was thus a question of law as to whether petitioner, if liable because of coverage of the statute, was liable for unpaid overtime or for twice that amount. There was a question whether the Administrator's intervention in the settlement might not deprive the employee of any right to suit for any additional liability (see point III(4), *supra*). Amid all these unsettled questions, there surely was room for the parties to make a settlement such as they did here. Even if some portion of the claim were concededly due, there were other liabilities in question, petitioner was called upon to concede coverage by making restitution, and therefore a release of any further liability will be sustained.

> The cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due * * * on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole. (*Chicago, Milwaukee &c. R'y Co.* v. *Clark*, *supra*, p. 367.)

In short, petitioner was called upon to alter its position—which was sufficient consideration for the release which it received in return.

(4) The issue presented below was solely whether the Act prohibits settlements as a matter of federal law (Pet. Br. 9 and note 4). The Solicitor General, however, has now imported the question of consideration into the case. Where federal statutes do not make contrary provision, the sufficiency of releases and other documents are tested by state law of the place where executed. State law generally favors releases upon slight or any consideration, and statutes fre-

quently deal with the matter. *Chicago, Milwaukee, &c. R'y v. Clark, supra,* pp. 365-366. Effective April 3, 1936, New York adopted Section 243 of the Debtor and Creditor Law which provides that—

> A written instrument, hereafter executed, which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, or a release or discharge in whole or in part of a mortgage, lien or charge upon personal or real property, shall not be invalid because of the absence of consideration or of a seal.

The release which here appears in the record (R. 7-8) was obviously modeled upon this state of the local law and the parties in the case have never contended otherwise. The sole issue in this case is whether the Fair Labor Standards Act prohibits settlements in which there is a full payment of statutory overtime, voluntarily and prior to an employee's suit, with a release of any further liability for liquidated damages.

It is respectfully submitted that the decision below should be reversed and remanded with instructions to enter a judgment of dismissal.

HOMER CUMMINGS,
SEDGWICK SNEDEKER,
JOSEPH V. LANE, JR.,
CARL MCFARLAND,
Counsel for Petitioner.

Of Counsel:
SNEDEKER & SNEDEKER,
CUMMINGS & STANLEY,

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